IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1135 of 1991

For Approval and Signature:

HONOURABLE MR.JUSTICE H.K.RATHOD

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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KACHRABHAI PUNJABHAI BAROT - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR KB ANANDJIWALA for Appellant.
MR PD BHATE Ld. APP for Opponent.

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CORAM : HONOURABLE MR.JUSTICE H.K.RATHOD

Date : 10/04/2006

ORAL JUDGMENT

1. Heard learned Advocate, Mr.K.B.Anandjiwala, appearing on behalf of appellant and learned APP, Mr.P.D.Bhate, appearing on behalf of respondent – State of Gujarat.

2. In the present appeal, the appellant – Kachrabhai Punjabhai Barot (original accused No.1) in Special ACB Case No.9 of 1986 committed offence under Section 161 of IPC and under Section 5(2) of Prevention of Corruption Act. The trial Court at Mehsana delivered the judgment and order on 7th December,1991 imposing sentence of RI for 1 year for Section 161 of IPC and RI for 2 years and fine of Rs.500/-, in default, RI for 6 months under Section 5(2) of Prevention of Corruption Act. The appeal admitted by this Court on 15th January,1992 and bail was granted to the appellant with fresh bonds.

3. Brief facts giving rise to the present appeal are as under :

3.1 The case of the prosecution is that both the accused Shri Kachrabhai Punjabhai Barot and Shri Parshottambhai Mohanbhai Chamar were serving as unarmed Police Constable at Harij Police Station on the date of incident. They were on duty near Petrol Pump at Harij on the night of 3rd May,1985. The officers of Anti-Corruption Bureau had on information received on 3rd May,1985 that there was a cattle fair at Deodar and merchants who were purchasing the cattle while transporting them in the truck, the local police collects illegal gratification under the pretext of entry fee. Therefore, Police Inspector ACB, Mr.N.R.Patil and other ACB Officers along with the staff members had come to Mehsana. They had called the Panchas from Mehsana and went to Radhanpur. Thereafter, all of them went to Deodar and one Ummarbhai Mallubhai Rauma, who was driving the Truck No.GRO 4314 while he was transporting 10 bullocks (cattle) purchased by

some merchants of Baroda when they were going in a truck, some police head constable and constables collected entry fee from them. The truck driver Ummarbhai paid the said amount to them which they had accepted and so papers were prepared against them. Thereafter, Ummarbhai Mallubhai Rauma told the ACB Officers that when they would take these bullocks (cattle) to Baroda on the highway, local police, highway police, traffic police and RTO persons would demand and collect illegally the bribe under the pretext of entry fee. So he was asked as to whether he would be helpful in catching them under trap or not. So Ummarbhai replied that he would positively help the police in this regard. The ACB officers and Panchas and Ummarbhai gathered at Rest House, Radhanpur. The Ummarbhai produced Rs.670/- of different denomination and anthracene powder was also sprinkled and ultra violate lamp was operated. There were marks of powder on all the currency notes. Then, Ummarbhai was instructed to

keep all the currency notes in the left pocket of shirt. The Ummarbhai and PW-1 Madhubhai T. Jani were directed to sit in driver cabin and he was also asked to hand over the currency notes stained with anthracene powder to those who halt their truck and demand the amount under the pretext of entry fee and if the amount is accepted, the signal be made by making dim-full light. The PW-1 was directed to hear the talk between the persons, who demands the bribe and the truck driver and to see exchange of currency notes. PW-2 was asked to remain with raiding party members and to hear and see the talk and exchange of currency notes. At that time, the first part of the Panchnama was made and it was at about 11.00 p.m. that was completed. Thereafter, all of them started in Truck No.GRO 4314 from Radhanpur Rest House and some of the officers started in Government vehicle. At about 11.50 p.m. when the truck reached near Hindustan Petrol Pump, one constable shouted on the highway

and signaled to stop the truck. Shri Ummarbhai, truck driver, halted the truck. The said constable told the driver as to why he was not halting the truck and that he was going straight way. The constable told him that it was his point and that he had forgotten that thing. The truck driver Ummarbhai replied that he had not forgotten him and that he had stopped the truck on hearing the shout. The constable demanded the entry fee and so the driver replied as to whether Rs.10/- would be sufficient. The constable told that they were two persons and Rs.10/- would not be sufficient. The driver told that as to whether he would be agreeable to accept Rs.15/-. The constable replied in the affirmative and so Ummarbhai gave two currency notes of the denomination of Rs.10/- each which were stained with anthracene powder and told the constable to give Rs.5/- back to him. The constable told that he was possessing Rs.4/- only. So the driver Ummarbhai told that he would not mind to accept

Rs.4/-. At that point of time, constable gave two currency notes of the denomination of Rs.2/- each and took out to currency notes of Rs.2/- from the pocket of uniform shirt with his left hand and he has also counted currency notes of Rs.2/- with both the hands. In the meantime, driver Ummarbhai made the signal by making dim full light and the ACB Officers reached there. The identification of the officers were given. The ultra violate lamp was operated and the currency notes of Rs.10/- were found stained with powder and there were signs of anthracene powder on the currency notes. There were also marks of the anthracene powder on the notes, clothes of Ummarbhai as well as on the left pocket of the shirt. That two currency notes of Rs.10/- each and the currency notes of Rs.2/- each were seized and the Panchnama was completed. The PI, Mr.Patil, lodged the compliant at Exh.28. The offence was registered against both the accused by the Investigating Officer Mr.T.M.Parmar. He has recorded the statement of

the witnesses on different dates. After obtaining the sanction for the prosecution from the DSP, both the accused were arrested and ultimately, they have been charge sheeted in the trial Court.

3.2 The charge at Exh.12 is framed against the accused and it is alleged that on 3rd May,1985, both the accused were serving as constable at Harij Police Station and as such, they were public servant. It is further alleged that when both the accused were on duty as public servant, they had stopped the truck No.GRO 4314 driven by Ummarbhai Mallubhai and demanded illegal gratification other than legal remuneration from him and thus, abused their position as public servant and accused No.1 had accepted Rs.20/- as a bribe from the said driver Ummarbhai without any right and the accused No.2, who was present at that time, had also aided and abated him and consequently, both the accused have committed offences punishable under Section

161, 165-A of IPC and Section 5(2) of the Prevention of Corruption Act. The accused have pleaded not guilty to the charge and they have claimed to be tried.

3.3 On behalf of the prosecution, PW-1 Madhubhai Trikamlal Jani is examined at Exh.17. PW-2 Nayankumar Vishnuprasad is examined at Exh.19. Unarmed Police Constable of ACB, Mehsana Punampuri Ganeshpuri is examined at Exh.20. Truck driver Ummarbhai Mallubhai is examined at Exh.23. The I.O. T.M.Parmar is examined at Exh.24. The complainant Mr.N.R.Patil is examined at Exh.27. The prosecution had also relied upon the documentary evidence to show that on 3rd and 4th May, 1985 both the accused were present on the duty and the duty list shows that both of them were required to keep a watch of petrol pump at Harij. The diaries were also produced at Exh.21 and Exh.22 of both the accused. Panchnama is at Exh.18. The sanction for the prosecution is at

Exh.25 and the complaint is at Exh.28. The receipt given to the accused No.1 for attachment of Rs.24/- from him is at Exh.29. Then the closing purshish was filed by public prosecutor.

3.4 The trial Court has recorded the further statement of both the accused in detail. None of the accused had examined any defence witnesses nor they have chosen to examine themselves as a witness on oath. Their defence is that of total denial and they have denied all the allegations made by the prosecution witnesses.

3.5 The accused No.1 – present appellant has stated in his further statement that on 3rd May,1985, he was standing on Harij four road for purchasing beedi and machis and after purchasing the same, he was going to his duty and at that time, a truck stopped there and all of sudden, driver handed over Rs.20/- to him and told him to give the change. There were two currency notes of

the denomination of Rs.2/- in his hands at that time and so he had told him that he had no change and he was having Rs.4/- only. At that time, ACB persons suddenly caught his hands and told him that he had accepted the bribe. He had told that he had not taken the bribe and these persons want change from him, so he has been wrongly involved in this incident. Similarly, accused No.2 has stated in his further statement that in reality, he was sleeping in the petrol pump and he was taken away there and arrested by the ACB Officers. Thereafter, the trial Court heard the learned Public Prosecutor Shri S.C.Shah and Advocate Shri B.G.Patel on behalf of the accused. In Para.11 of the judgment the following points emerged for the determination for the trial Court:

i) Whether the prosecution proves that the accused Nos.1 and 2 were serving as unarmed police constable and as public

servant had stopped truck No.GRO 4314 driven by Ummarbhai Mallubhai and demanded and accepted Rs.20/- as illegal gratification other than their legal remuneration for economic gain and thus, abused their position as public servant. Ultimately, finding given by the trial Court in the affirmative so far as accused No.1 is concerned – present appellant and acquitted the accused No.2."

4. I have heard the learned Advocate, Mr.K.B.Anandjiwala, for the appellant and learned APP, Mr.P.D.Bhate, on behalf of respondent – State at length. I have perused the oral evidence of the witnesses from prosecution side and the judgment of the trial Court. I have also comprehensively appreciated the evidence which was led before the trial Court and considered the Panchnama drawn by ACB Officers. I have also

considered in detail and appreciated the further statement given by accused No.1 – present appellant under Section 313 of the Code of Criminal Procedure. I have also considered the statement of the accused in respect to sentence. I have also considered the decision which has been relied by the trial Court. I have also considered the evidence appreciated by the trial Court in the manner and method which has been adopted by trial Court while appreciating the oral and documentary evidence produced before the trial Court.

5. This matter was notified on 31st March,2006. At that occasion, this Court relying upon the order dated 29th July,2002 issued notice to the appellant for engaging another Advocate. The said notice was made returnable on 26th April,2006. However, today, learned Advocate, Mr.Anandjiwala, submitted that initially learned Senior Advocate, Mr.P.M.Thakkar, was engaged by

the appellant. Thereafter, learned Senior Advocate, Mr.Thakkar, had returned the papers back to the appellant and then, he was engaged as a lawyer by the appellant. Therefore, he submitted that there is no necessity to wait upto returnable date 26th April,2006, but this Court can take up the matter today as he is prepared to argue the matter on behalf of the appellant. Therefore, considering the submission made by learned Advocate, Mr.Anandjiwala, present appeal is taken up for final hearing today.

6. Learned Advocate, Mr.Anandjiwala, appearing on behalf of appellant submitted that trial Court has committed gross error in coming to conclusion. He submitted that the judgment of the trial Court is erroneous on facts as well as on law. The trial Court has committed serious error in convicting the appellant in spite of the fact that the Shri Ummarbhai Mallubhai has not at all supported the case of the prosecution. Not

only that but he has not even identified the appellant before the trial Court. The driver Ummarbhai was not even declared hostile by the prosecution nor was cross-examined and this being a serious infirmity in the case of the prosecution and in absence of the evidence of complainant, the conviction is illegal. He further submitted that the evidence of complainant who is in the nature of an accomplice is required to be corroborated by the evidence of independent witnesses like Panchas. Though the Panchas lended some support to the story of prosecution when the complainant himself is absolutely unreliable, then, no amount of corroboration can cure this fundamental defect. He also submitted that the trial Court has failed to appreciate the material omissions and contradictions appearing in the evidence of Panch witnesses and investigating officer regarding where the Panchnama was prepared and where the initial Panchnama was made. The panchas have

stated that the Panchnama was prepared at Mehsana, while the I.O. stated that Panchnamas were prepared at Radhanpur. This fundamental defect has been lightly brushed aside by the trial Court. The trial Court partly believed the case of prosecution and partly relied upon the statement of the accused under Section 313 of the Code of Criminal Procedure, wherein, the accused has stated that he was asked to give change of Rs.20/- by the driver Ummarbhai, but he had refused to give as he had no change. The trial Court has committed serious error in believing only the part of statement in favour of prosecution without considering the other part, wherein, appellant denied to have accepted the bribe. The panchas were selected Government witnesses, who were bound to support the say of the prosecution under fear of being declared hostile and in eventuality, he would loose the job. The evidence of Panchas also is contradictory on major aspect. He also submitted

that the story of so many persons were travelling in the cabin of the truck and it is impossible to accommodate so many persons in the cabin of truck simultaneously. The trial Court has committed error and failed to appreciate that mere finding of the notes from the person of the appellant would not prove the offence of accepting bribe because to establish the bribe, the prosecution has to establish that there were initial demand, acceptance and recovery of money. The prosecution has to establish positively what talk transpired between the truck driver Ummarbhai and the appellant. There is no reliable evidence in any of the points and, therefore, case against the appellant was not duly established by legally reliable and unimpeachable evidence. The trial Court has given benefit to the prosecution by observing that the witnesses deposed after a period of 5 years and, therefore, the memory would be feeble. This approach of the trial Court is dangerous when public servant is likely to be

convicted and loose his job. The co-accused falsely implicated and against that no evidence. Similarly, there was no evidence against the present appellant. Learned Advocate, Mr.Anandjiwala, also submitted that the charge framed against the appellant by the trial Court demanding bribe of Rs.20/- is not proved against the appellant. There was no evidence suggesting the demand of Rs.20/- by the appellant from the driver Ummarbhai. He also submitted that the sanction given by the competent authority under Section 6(1)(g) of the Prevention of Corruption Act, 1947 is for demanding Rs.15/- as an entry fee from the driver Ummarbhai. Therefore, he submitted that the order of sanction and framing of charge are itself contradictory and, therefore, the prosecution has not proved the charge against the appellant of demanding Rs.20/- from the driver Ummarbhai. He also submitted that Panchnama cannot be considered to be an independent evidence but it should have to be

used to corroborate or to contradict the evidence of panchas. He also submitted that the evidence of driver Ummarbhai as a whole has not been considered by the trial Court. He also submitted that further statement under Section 313 of the Code of Criminal Procedure given by the appellant – original accused No.1 is also believable and probable because Shri Patil, a person of raiding party, was travelling in the truck at the time of incident and, therefore, the evidence of Ummarbhai is reliable to the extent that Shri Patil by force gave Rs.20/- of the denomination of Rs.10/- each in the hand of appellant and demanding the change from appellant. The presence of Rs.4/- of the denomination of Rs.2/- each suggests that change must have been asked by Mr.Patil. He also submitted that amount was in the hand of accused which was not put in the pocket of the accused. Therefore, his submission is that there is no reliable evidence which proves the prosecution case against the appellant

beyond reasonable doubt. Therefore, he submitted that judgment and order of conviction may be set aside.

7. Learned APP, Mr.P.D.Bhate, appearing on behalf of respondent – State submitted that the present appellant – original accused No.1 admittedly had accepted Rs.20/- and so there is a presumption that it was an amount of bribe. The theory of the accused No.1 that the driver had given Rs.20/- for getting the change is not probable and believable and there is no rebutable evidence to rebut the presumption raised under Section 4 of the Statute. The accused No.1 had not examined any public witnesses nor the employees of the petrol pump to show and prove that the amount of Rs.20- was given to him for getting the change. He has also submitted that the preparing of the Panchnama at Mehsana or at Radhanpur which can be said to be a contradiction would not be of a glaring and major and it would

discredit the evidence of both the witnesses particularly when the incident had happened before six years and so as a human nature every person's memory would be fallible. It was a running trap and so witnesses would not be said to be interested to say as to unnecessarily implicate the accused falsely. Thus, the driver Ummarbhai has stated that Rs.20/- was accepted as entry fee by the appellant. Shri Patil was also sitting in the truck and he had seen the incident. So according to learned APP, Mr.Bhate, the case is proved against the appellant and there is no reason to disbelieve the credence and testimonies of all the witnesses and, therefore, he submitted that the trial Court has rightly convicted the present appellant.

8. I have considered the submissions made by both the learned Advocates appearing for the parties. Before dealing with the same, it is necessary to consider the relevant Section 161,

165-A of the IPC; Section 5(2) of the Prevention of Corruption Act and Section 114 of the Indian Evidence Act, which are quoted as under :

> **"161 – Indian Penal Code** - Public servant taking gratification other than legal remuneration in respect of an official act.- Whoever, being or expecting to be a public servant, accepts or obtains, or agrees to accept, or attempts to obtain from any person, for himself or for any other person, any gratification whatever, other legal remuneration as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official functions, favour or disfavor to any person, or for rendering or attempting to render any service or disservice to any person, *with the Central or any State Government or Parliament or the Legislature of any State or with any local authority corporation of Government company referred to in Section 21 or* with any public servant, as such, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

165-A. Punishment for abetment of offences defined in Section 161 or Section 165.- Whoever abets any offence punishable under Section 161 of Section 165, whether or not that offence is committed in consequence of the abetment, shall be punished with imprisonment of either description for a term which may extend to three years or with fine or with both.

Section 5(2) of Prevention of Corruption Act:-Any public servant who commits criminal misconduct shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to seven years and shall also be liable to fine.

Provided that the Court may, for any special reasons recorded in writing, impose a sentence of imprisonment of less than one year.

Section 114 of Indian Evidence Act : Court may presume existence of certain facts.- The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their

relation to the facts of the particular case.

The Court may presume---

(a) That a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession;

(b) That an accomplice is unworthy of credit, unless he is corroborated in material particulars;

(c) That a bill of exchange, accepted or endorsed, was accepted or endorsed for good consideration;

(d) That a thing or state of things which has been shown to be in existence within a period shorter than that within which such things or state of things usually cease to exist, is still in existence;

(e) That judicial and official acts have been regularly performed;

(f) That the common course of business has been followed in particular cases;

(g) That evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds

it;

(h) That if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him;

(i) That when a document creating an obligation is in the hands of the obligor, the obligation has been discharged.

But the Court shall also have regard to such facts as the following, in considering whether such maxims do or do not apply to the particular case before it:-

As to *illustration* (a)- *A* shop-keeper has in his till a marked rupee soon after it was stolen, and cannot account for its possession specifically, but is continually receiving rupees in the course of his business;

As to *illustration* (b)- A, a person of the highest character, is tried for causing a man's death by an act of negligence in arranging certain machinery. B, a person of equally good character, who also took part in the arrangement,

describes precisely what was done, and admits and explains the common carelessness of *A* and himself;

As to *illustration* (b)- A crime is committed by several persons. *A, B* and *C* , three of the criminals, are captured on the spot and kept apart from each other. Each gives an account of the crime implicating *D,* and the accounts corroborate each other in such a manner as to render previous concert highly improbable;

As to *illustration* (c)- *A,* the drawer of a bill of exchange, was a man of business. *B,* the acceptor, was young and ignorant person, completely under *A's* influence;

As to *illustration* (d)- It is proved that a river ran in a certain course five years ago, but it is known that there have been floods since that time which might change its course;

As to *illustration* (e)- A judicial act, the regularity of which is in

question, was performed under exceptional circumstances;

As to *illustration* (f) - The question is, whether a letter was received. It is shown to have been posted, but the usual course of the post was interrupted by disturbances;

As to *illustration* (g)- A man refuses to produce a document which would bear on a contract of small importance on which he is sued, but which might also injure the feelings and reputation of his family;

As to *illustration* (h)- A man refuses to answer a question which he is not compelled by law to answer, but the answer to it might cause loss to him in matters unconnected with the matter in relation to which it is asked;

As to *illustration* (i)- A bond is in possession of the obligor, but the circumstances of the case are such that he may have stolen it."

9. In relation to the above Sections,

whether the offence has been proved against the appellant or not and whether the trial Court has rightly convicted the appellant or not, for that the relevant law on the subject is necessary to be considered before dealing with the evidence made before the trial Court.

10. In case of Gulag Mahmud A. Male Vs. The State of Gujarat, reported in AIR 1980 SC 1558, the Apex Court has observed that “in assessing the evidence of a witness, the entire background of the prosecution story should be kept in mind.”

10.1 In case of M.O.Shamshudhin Vs. State of Kerala, reported in 1996 (1) GLH 371, the Apex Court has observed that, “Therefore, in seeking corroboration for the evidence of trap witnesses a distinction has to be drawn where participation of an individual in a crime is not voluntary but is the result of pressure. In such a case the element of mens rea to commit the crime is not

apparent and cannot strictly be classified as an accomplice and at any rate be treated as being on the same footing.

“The word “accomplice” is not defined in the Evidence Act. However, it is accepted that the word is used in its ordinary sense which means signifies a guilty partner or associate in a crime. Illustration (b) to S.114 in a way cautions the court to bear in mind the presumption that an accomplice is not worthy of credit unless he is corroborated in material particulars.

“The purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm and support that such evidence is sufficient and satisfactory and credible. The corroborative evidence will only fill its role if it itself is completely credible.”

10.2 In case of Gopal Lal Ghisulal Chhipa & Ors Vs. The State of Gujarat, reported in 1998 (1) GLH 943, this Hon'ble Court has held that, “If credibility of the case of the prosecution is certainly doubtful and the prosecution case must fail (See : Bhagwansinh Vs. The State of Rajasthan, AIR 1976 SC 985). In case of corruption, demand and acceptance requires to be proved without any doubt and if one of them is not proved being the vital part the offence cannot be said to have been constituted.”

10.3 In case of Panalal Damodar Rathi Vs. The State of Maharashtra, reported in AIR 1979 SC 1191, Head Note A is quoted as under : “Evidence of complainant – Evidentiary value – complainant in no better position than accomplice after introduction of S.165-A – corroboration in material particulars – necessary connecting the accused with the crime has to be insisted upon.”

10.4 In case of Parsuram Pandey & Ors. Vs. State of Bihar, reported in 2004 AIR SCW 5779, the Apex Court has observed that " under Section 311 of Code of Criminal Procedure, recording statement of accused the mode and manner – it is imperative on Court to record statement of accused persons so as to give opportunity to accused persons to explain any incriminating circumstance proved by prosecution by prosecution. If such opportunity is not afforded, incriminating piece of evidence proved by prosecution cannot be relied upon."

10.5 In case of P. Mani Vs. State of Tamil Nadu, reported in 2006 AIR SCW 1053, the Apex Court observed that "burden of proof under Section 106 of Evidence Act in criminal case is on prosecution. In a criminal case, it is for the prosecution to prove the involvement of accused beyond the reasonable doubt."

10.6 In case of Subhash Parbat Sonvane Vs. State of Gujarat, reported in (2002) 5 SCC 86, the Apex Court has observed in Para.7 and 8 as under :

> “7. This Court interpreted similar provisions under the Prevention of Corruption Act, 1947 in Ram Krishan and another v. The State of Delhi [(1956) SCR 183]. In the said case, the Court dealt with similar clause (d) of sub-section 1 of Section 5 and held that there must be proof that the public servant adopted corrupt or illegal means and thereby obtained for himself or for any other person any valuable thing or pecuniary advantage. The Court observed
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> "In one sense, this is no doubt true but it does not follow that there is no overlapping of offences. We have primarily to look at the language employed and give effect to it. One class of cases might arise when corrupt or illegal means are adopted or pursued by the public servant to gain for himself a pecuniary advantage. The word"obtains",

on which much stress was laid does not eliminate the idea of acceptance of what is given or offered to be given, though it connotes also an element of effort on the part of the receiver. One may accept money that is offered, or solicit payment of a bribe, or extort the bribe by threat or coercion; in each case, he obtains a pecuniary advantage by abusing his position as a public servant"

The Court further observed that

"It is enough if by abusing his position as a public servant a man obtains for himself any pecuniary advantage, entirely irrespective of motive or reward for showing favour or disfavour"

8. Similarly, in M.W. Mohiuddin v. State of Maharashtra [(1995)3 SCC 567] the Court dealt with Section 13(1)(d)(i) and (ii) and after referring to the decision quoted above as well as dictionary meaning of word "obtains" observed whether there was an acceptance of what is given as a bribe and whether there was an effort on the part of the

receiver to obtain the pecuniary advantage by way of acceptance of the bribe depends on the facts and circumstances of each case. In that case, the Court held that it was proved that accused made a demand and also got the affirmation from the complainant that he had brought the demanded money and at his instance, the complainant wrapped the money in the handkerchief given by the accused and placed the same on the bag which was brought by the accused and as asked by him; these steps have been taken into consideration in arriving at the conclusion that the accused had in fact "obtained" the pecuniary advantage, namely, that he received the illegal gratification. Therefore, the Court upheld the conviction under Section 13(1)(d).Lastly, in C.K. Damodaran Nair v. Govt. of India [(1997) 9 SCC477], this Court considered the word "obtain" used in Section 5(1)(d)and held as under

"12.The position will, however, be different so far as an offence under Section 5(1)(d) read with Section 5(2) of the Act is concerned. For such

an offence,prosecution has to prove that the accused "obtained" the valuable thing or pecuniary advantage by corrupt or illegal means or by otherwise abusing his position as a public servant and that too without the aid of the statutory presumption under Section 4(1) of the Act as it is available only in respect of offences under Section 5(1)(a) and (b)and not under Section 5(1)(c), (d) or (e)of the Act. "Obtain" means to secure or gain (something)as the result of request or effort (Shorter oxford dictionary). In case of obtainment the initiative vests in the person who receives and in that context a demand or request from him will be a primary requisite for an offence under Section 5(1)(d) of the Act unlike an offence under Section 161 IPC, which, as noticed above,can be, established by proof of either "acceptance" or "obtainment".

10.7 In case of Pavan Kumar Vs. State of Haryana, reported in (2001) 3 SCC 628, the Apex Court held, in Para.2 and 3, has observed as

under:

> “2. Before adverting to the rival contentions, be it noted that the entire matter hinges on circumstantial evidence. There is also however existing on record, a dying declaration, but its effect on the matter, shall be discussed shortly hereafter in this judgment. Incidentally success of the prosecution on the basis of circumstantial evidence will however depend on the availability of a complete chain of events so as not to leave any doubt for the conclusion that the act must have been done by the accused person. While however, it is true that there should be no missing links, in the chain of events so as far as the prosecution is concerned, but it is not that every one of the links must appear on the surface of the evidence, since some of these links may only be inferred from the proven facts. Circumstances of strong suspicion without however any conclusive evidence are not sufficient to justify the conviction and it is on this score that great care must be taken in evaluating the circumstantial evidence. In any event, on the availability of two inferences, the

one in favour of the accused must be accepted and the law is well settled on this score, as such we need not dilate much in that regard excepting however, noting the observations of this Court in the case of State of U.P. v. Ashok Kumar Srivastava, AIR 1992 SC 840 : (1992 AIR SCW 640 : 1992 Cri LJ 1104 : 1992 All LJ 115) wherein this Court in paragraph 9 of the report observed:-

"The Court has, time out of number,observed that while appreciating circumstantial evidence the Court must adopt a very cautious approach and should record a conviction only if all the links in the chain are complete pointing to the guilt of the accused and every hypothesis of innocence is capable of being negatived on evidence. Great care must be taken in evaluating circumstantial evidence and if the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted. The circumstance relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt. But this is not

to say that the prosecution must meet any and every hypothesis put forward by the accused however far-fetched and fanciful it might be. Nor does it mean that prosecution evidence must be rejected on the slightest doubt because the law permits rejection if the doubts is reasonable and not otherwise....."
3. The other aspect of the issue is that the evidence on record, ascribed to be circumstantial, ought to justify the inferences of the guilt from the incriminating facts and circumstances which are incompatible with the innocence of the accused or guilt of any other person. The observations of this Court in the case of Balwinder Singh v. State of Punjab, AIR 1987 SC 350 : (1987 Cri LJ 330) lends concurrence to the above.

10.8 In case of Smt. Meena Balwant Hemke Vs. State of Maharashtra, reported in 2000 AIR SCW 1640, the Apex Court held, in Para.9 and 10, observed as under :

“9. The essential ingredients to be

established to indict a person of an offence under Section 5 (1) (d) of the Act are that he should have been a public servant; that he should have used corrupt or illegal means or otherwise abused his position as such public servant, and that he should have obtained a valuable thing or pecuniary advantage for himself or any other person. Likewise, Section 161, IPC, requires that the person accepting the gratification should be a public servant; that he should accept the gratification for himself and the gratification should be as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official function, favour or disfavour to any person. Like any other criminal offence, the prosecution has to prove the charge beyond reasonable doubt and accused should be considered innocent, till it is established otherwise by proper proof of acceptance of the illegal gratification, the vital ingredient, necessary to be established to procure a conviction for the offences under consideration.

We have bestowed our careful thought to

the submissions made on either side, in the light of the evidence on record. We are of the view that neither the quality of the materials produced nor their proper evaluation could, in this case, be held sufficient to convince or satisfy the judicial conscience of any adjudicating Authority to record a verdict of guilt, on such slender evidence. Indisputably, the currency note in question was not recovered from the person or from the table drawer, but when the trap party arrived was found only on the pad on the table and seized from that place only. The question is as to whether the appellant accepted it and placed it on the table or that the currency note fell on the pad on the table in the process of the appellant refusing to receive the same by pushing away the hands of PW-1 and the currency, when attempted to be thrust into her hands. PW-2, one of the panch witnesses, who accompanied PW-1, as a shadow witness, when he tried to give the bribe, did not support the prosecution case. He has been treated hostile and his evidence eschewed from consideration by the Courts below. The lady Constable, Victoria, another

shadow witness, who first arrived on the spot after the signal was given by PW-1, was not examined at the trial. Law has always favoured the presence and importance of a shadow witness in the trap party, not only to facilitate such witness to see but also overhear what happens and how it happens also. In this case, the role of Victoria was to enter first and hold the hands of the accused immediately after the acceptance of the bribe amount and she was stated to have done that, as planned. For reasons best known, such a vital and important witness has been withheld by the prosecution, from being examined Jagdish Bokade, who scribed the application dated 13-8-1986 for getting copies and who admittedly was all along with PW-1 and gave even the idea of lodging a complaint with the Anti-Corruption Bureau, has also been withheld from being examined. The other person, who was present at the place of occurrence though cited initially as witness, was not examined by the prosecution but later was got examined as DW-1 and evidence of this person completely belies the prosecution story. The corroboration essential in a

case like this for what actually transpired at the time of the alleged occurrence and acceptance of bribe is very much wanting in this case. Even the other panch witness, PW-5, categorically admitted that even as the Inspector of Police, PW-6, arrived, the appellant gave the same version that PW-1 tried to force into her hands the currency note which she turned down by pushing it away, and his evidence also does not lend credibility to the case of the prosecution. The contradictory version of PW-I of the very incident when earlier examined in departmental proceedings renders his testimony in this case untrustworthy. PW-3, the Head Copyist, seems to be the brain behind all these and that PW-1 as well as Jagdish Bokade appear to be working as a group in this affair and despite the blunt denial by PW-3, his closeness to PW-1 and Jagdish Bokade stand well substantiated. All these relevant aspects of the case seem to have been completely overlooked by the Courts below.

10. The learned Judge in the High Court seems to have mechanically affixed his approval to the findings recorded by the

trial Judge by profusely extracting such findings. Mere recovery of the currency note of Rupees 20/- denomination, and that too lying on the pad on the table, by itself cannot be held to be proper or sufficient proof of the acceptance of the bribe, in the peculiar circumstances of this case which lend also credence to the case of the appellant that it fell on the table in the process of the appellant pushing it away with her hands when attempted to be thrust into her hands by PW-1. The results of phenolphthalein test, viewed in the context that the appellant could have also come into contact with the currency note when she pushed it away with her hands cannot by itself be considered to be of any relevance to prove that the appellant really accepted the bribe amount. With such perfunctory nature of materials and the prevaricating type of evidence of PW-1 and PW-3, who seem to have strong prejudice against the appellant, it would be not only unsafe but dangerous to rest conviction upon their testimony. PW-1, if really was keen on getting the copy of the record urgently, could have made an urgent application to

have been delivered within 3 days instead of making an ordinary application and going on such an errand, which makes it even reasonable to assume that the trio of PW-1, PW-3 and Jagdish Bokade were attempting to weave a web around the appellant to somehow get her into trouble and victimise her.” (emphasis supplied)

10.9 In case of State of U.P. Vs. Jagdish Singh Malhotra, reported in 2001 AIR SCW 2392, the Apex Court has, in Para.8, observed as under :

“8. In so far as the Phenolphthalein test is concerned, we find that the explanation given by the respondent for presence of crystals of phenolphthalein on his hands, which were washed in a solution of Sodium Carbonate, and the solution had turned pink, is quite plausible. Categorically denying the handling or receiving of the tainted currency notes he stated that he shook hands with the officers and the Phenolphthalein crystals could have come on to his hands during that time. This factor becomes probable, when we find that

witnesses examined at the trial are interested witnesses who may have a reason to falsely implicate the respondent, who had been challenging their vehicles on various grounds. In this connection, it deserves a notice that according to the complainant – PW-6 he had raised an amount of Rs.1000/- from different sources, including by collecting money from some of the members of their Union for paying bribe to the respondent, we have it from the statement of PW-5 Lakhpat Rai that "Rs.1000/- to be given to the accused had been given by us from the funds of the Matador Union." This circumstances casts a doubt on the genuineness of the prosecution case and creates and impression that the Union and its members could have falsely implicated the respondent." (emphasis supplied).

10.10 In case of State of Tamil Nade Vs. Krishnan and Another, reported in 2001 AIR SCW 2415, the Apex Court has, in Para.5, observed as under :

> “5. That apart, it is an admitted case that the amount of Rs.4,000/-, tainted money, which is alleged to have been demanded, was recovered from under a pair of trousers from the cot in room No.19 at Tilak Lodge by the trap party. According to respondent No.1, he was in the bathroom and, when he came out, he found Pws.1, 2 and 3 sitting on the cot when the raid party suddenly appeared and picked up the amount of Rs.4000/- from under the pair of trousers. The fact that Pws.1,2 and 3 were already sitting on the cot where the pair of trousers was lying from underneath which the amount was recovered is not disputed. Under these circumstances, it does probabilse the defence version given by the respondents that bribe money was planted by Pws.1,2 and 3, who were engaged in illicit distillation and sale of arrack, to falsely trap the respondents, who were serving in the Prohibition Wing of the police, by placing the amount under the trousers of respondent No.1.” (emphasis supplied).

10.11 In case of Ganga Kumar Srivastava Vs. State of Bihar, reported in 2005 AIR SCW 3617,

the Apex Court has, in Para.20 and 21, observed as under :

> “20. We must not forget that in a trap case the duty of the officer to prove the allegations made against a Government Officer for taking bribe is serious, and therefore, the officers functioning in the Vigilance Department must seriously endeavor to secure really independent and respectable witnesses so that the evidence in regard to raid inspires confidence in the mind of the court and the Court is not left in any doubt whether or not any money was paid to the public servant by way of bribe. It is also the duty of the officers in the Vigilance Department to safeguard for the protection of public servants against whom a trap case may have been laid. (emphasis supplied)
>
> 21. In view of the discussions made and the decisions of the court above, we are of the opinion that considering the fact that the present case was also a case of trap of a public servant a duty was cast upon the authorities to use phenolphthalein powder for the purpose of proving the charge of bribe of the

appellant without relying only on the oral and documentary evidence adduced from the side of the prosecution. Therefore, in our view, where admittedly the recovered notes were not treated with phenolphthalein powder so that the handing of such marked notes by the appellant could be detected by chemical process and the court need not have to depend on the oral evidence which is something of a dubious character to decide the fate of a public servant. Keeping the aforesaid in our mind, we are of the view that the defence was much more probable. Defence case was that the bushshirt hanging in the peg where the complainant came, the appellant was at that point of time asleep in the next room and father of the appellant went to wake him up and at that point of time the notes were thrust into the pocket of the hanging bushshirt, which the appellant wore when he came to the outer room as he was in his ganji and lungi. In view of our discussions made hereinabove, we are of the view that the defence case must be held to be probable. Accordingly, we must hold that in the light of the discussions made hereinabove, the evidence led on

behalf of the prosecution was not such as to inspire confidence in the mind of this Court, and therefore, we are not at all satisfied that the appellant either demanded Rs.150/- from the complainant or the complainant paid bribe to the appellant by handing over two marked currency notes to him." (emphasis supplied).

10.12 In case of T.Subramanian Vs. State of Tamil Nade, reported in AIR 2006 SC 836, the Apex Court has, in Para.7, observed as under :

"7. Mere receipt of Rs.200/- by the appellant from PW-1 on 10.7.1987 (admitted by the appellant) will not be sufficient to fasten guilt under Section 5(1)(a) or Section 5(1)(d) of the Act,in the absence of any evidence of demand and acceptance of the amount as illegal gratification. If the amount had been paid as lease rent arrears due to the temple or even if it was not so paid, but the accused was made to believe that the payment was towards lease rent due to the temple, he cannot be said to have committed any offence. If the reason for receiving the amount is

explained and the explanation is probable and reasonable, then the appellant had to be acquitted, as rightly done by the Special Court. In Punjabrao v. State of Maharashtra [2002 (10) SCC 371], the accused, a patwari, was on a campaign to collect loan amounts due to Government. The complainant therein was admittedly a debtor to the Government. The accused explained that the amount in question was received towards loan. This Court accepted such explanation (though such explanation was not immediately offered as in this case, but was given only in the statement under Section 313) holding thus :-

"It is too well settled that in a case where the accused offers an explanation for receipt of the alleged amount, the question that arises for consideration is whether that explanation can be said to have been established. It is further clear that the accused is not required to establish his defence by proving beyond reasonable doubt as the prosecution, but can establish the same by preponderance of probability."

In Chaturdas Bhagwandas Patel v. The State of Gujarat (AIR 1976 SC 1497), this Court held that the burden that rests on an accused to displace the statutory presumption that is raised under Section 4(1) of the Act, is not onerous as that cast on the prosecution to prove its case. But such burden has to be discharged, by bringing on record evidence, either direct or circumstantial, to establish with reasonable probability, that the money was accepted by him, other than as a motive or reward as is referred to in Section 161 IPC.

In State through Inspector of Police, Andhra Pradesh v. K. Narasimhachary [2005 (8) SCALE 266], we have reiterated the well recognized principle that if two views are possible, the appellate court should not interfere with the acquittal by the lower court; and that only where the material-on-record leads to a sole and inescapable conclusion of guilt of the accused, the judgment of acquittal will call for interference by the appellate court.“(emphasis supplied)

10.13 In case of Om Prakash Vs. State of Haryana, reported in AIR 2006 SC 894, the Apex Court has, in Para.21 and 22, observed as under :

> "21. The first informant and the witnesses are not ordinary people. They were Inspector and Head Constables attached to a police station. They are presumed to know the implications of a criminal case. They are, thus, also presumed to know that the First Information Report unless lodged at the earliest possible time may give rise to a suspicion about the correctness of the entire occurrence.
>
> 22. In view of the aforementioned discrepancies in the prosecution case, we are of the opinion that the defence story set up by the Appellant cannot be said to be wholly improbable. Furthermore, it is not a case where the burden of proof was on the accused in terms of Section 20 of the Act. Even otherwise, where demand has not been proved, Section 20 will also have no application. [Union of India Thr. Inspector, CBI v. Purnandu Biswas, 2005 (8) SCALE 246 and T. Subramanian v. State

of Tamil Nadu, [2006 (1) SCALE 116].“ (emphasis supplied).

11. In view of the above legal position decided by the Apex Court as well as the various High Courts in number of cases, now I am examining the judgment delivered by the trial Court. The trial Court narrated the factual aspect of the case and in Para.9 of the judgment has come to conclusion that the fact that accused No.1 had accepted Rs.20/- is also not in dispute, but the only crucial question is as to whether said acceptance of Rs.20/- by accused No.1 was a bribe or for getting the change as asked for by the driver. This observation of the trial Court is contrary to the sanction granted by the competent authority and is contradictory to the evidence of both the Panchas as well as Mr.Patil and driver Ummarbhai. There is no evidence on record which proves the fact that appellant has demanded Rs.20/- from the driver Ummarbhai. Looking to the conversation between the driver

Ummarbhai and appellant, the demand was not established in the facts of this case. The two panchas are government servant. Shri Madhubhai T. Jani was examined vide Exh.17 and Shri Nayankumar Vishnuprasad was examined vide Exh.19. Both were serving as Head Clerk and Senior Clerk in District Panchayat, Mehsana. In evidence of Panchas, the constable told him to pay him his charges (entry fee) from the driver shown Rs.10/-, but the constable asked for Rs.20/-. So the driver handed over two currency notes of Rs.10/- each which was accepted by him and at that time, driver of truck signaled by making light dim-full. This evidence of Panchas is contradictory to even Panchnama. That Rs.20/- was taken out from the pocket of the constable is also not correct looking to the evidence of driver Ummarbhai and Shri Patil. The trial Court has not properly appreciated the evidence of both the Panchas. If the evidence of Panchas was correct as narrated in Para.14 of the judgment,

as discussed by the trial Court, then the question of having Rs.4/- of the denomination of Rs.2/- each in the hand of accused at the time when the raid was taken place does not arise. It is not in dispute looking to the evidence that at the time when the raid was effected, the amount of Rs.20/- of the denomination of Rs.10/- each and Rs.4/- of the denomination of Rs.2/- each were found in the hand of appellant. Meaning thereby that amount of bribe was not found from the pocket of the appellant. The first part of the panchanama was prepared at Mehsana as per the evidence of Madhubhai T. Jani Exh.17. The PW-2 has not supported the evidence of PW-1. The evidence of both the Panchas are contradictory and not established the case of prosecution. While returning journey from Radhanpur, PW-2 Nayankumar Vishnuprasad was travelling in the jeep and not in the truck. The time given by Panchas in their evidence is also not correct when they reached to Harij, the place of

incident. The PW-1 was not aware that from which hand the amount of bribe has been accepted by the appellant. PW-1 has also deposed before the trial Court that he had not seen any incident as he was sitting on the back side of the driver. There is a clear evidence of PW-2 Nanyankumar Vishnuprasad at Exh.19 that driver and police constable had talked but he could not hear perfectly and completely. The driver paid Rs.20/- to the accused No.1 and he had kept the notes in the pocket of the shirt and the driver made signaled by making the light dim-full. This is also not corroborative evidence given by the Panchas because at the time when the raid was completed, amount of Rs.20/- and Rs.4/- were found in the hand of appellant. So there is no complete satisfactory evidence given by both the Panch Witnesses about demand and acceptance of the amount of bribe by appellant from the driver Ummarbhai. The driver was prepared by ACB party to the effect that during the travelling from

Radhanpur to Mehsana, if any police was officer or constable stops the truck, then, he should have to give the amount immediately to such police officer or constable. Meaning thereby that there was a compulsion or pressure on the part of driver Ummarbhai a moment truck was stopped by police, he should have to hand over some amount in the hand of concerned police personnel. So there was no demand of any amount by the appellant from the driver at the time when the truck was stopped at Harij Four Road. There is no corroborative evidence in respect to the first part of panchnama whether it was prepared at Mehsana or at Radhanpur. There is also contradictory evidence between two Panchas in respect to whether they were staying at Radhanpur Circuit House or they were accompanied to ACB Police upto Deodar. There is no clear and satisfactory evidence produced by the prosecution before the trial Court. The prosecution case based on independent evidence means two Panchas

Exh.17 and Exh.19. Both are independent witnesses and not police personnel. According to case of prosecution, both the Panchas were heard the conversation between the appellant and driver. But in the oral evidence led before the trial Court both the Panchas have not supported each other and the case of prosecution. Both the panchas have deposed before the trial Court that the talk between the appellant and the driver could not hear clearly, perfectly and completely. According to PW-1 Madhubhai T. Jani (Exh.17) the ACB officers instructed to driver to pay the money to the police constable, who asked for the money. The evidence of Punampuri Ganeshpuri (Exh.20) who was serving as police constable in ACB, Mehsana suggests that first portion of the Panchnama was prepared at Radhanpur. In the cabin of truck, driver Ummarbhai, two Panchas, PI Shri Patil, he himself, PSI Shri Desai, Shri Qureshi and two persons were sitting that itself is improbable looking to the size of the cabin of

the truck. This amounts to accommodate 9 persons in the driver cabin of the truck. The evidence of Punampuri Ganeshpuri Exh.20 suggests that when truck driver Ummarbhai stopped the truck, appellant came near the truck and told the driver as to why he had not stopped the truck since it was his point. The driver replied that he had not forgotten and that he had stooped the truck on hearing his voice. The accused No.1 told him to give the entry fee, so there is no demand of exact amount of bribe by accused No.1 from the driver. The driver asked the appellant as to whether Rs.10/- would be sufficient. The constable told that there were two persons, so driver replied as to whether it would be sufficient if he pays Rs.15/- and constable replied in the affirmative. The truck driver gave two currency notes of Rs.10/- each from his pocket and handed over to the constable by saying him to give Rs.5/- back. The constable took out two currency notes of Rs.2/- each and told the

driver that he has Rs.4/- and whether he would be satisfied. The driver replied that it would do. This conversation as referred above between driver and accused No.1 narrated by Punampuri Ganeshpuri vide Exh.20. The evidence of Punampuri is not supported by the evidence of two Panchas. The Panchas gave different story. Looking to the conversation between driver and accused No.1, in fact, there was no demand of any specific amount by the accused and he was asked to pay entry fee. The driver Ummarbhai was having the bullocks (cattle) in his truck, it may require the entry fee. That aspect has not been examined by the trial Court. Whether any entry fee is necessary in light of the facts that in the truck there were more than 10 bullocks (cattle). Shri Punampuri had gone to Deodar as per his evidence. Shri Punampuri was sitting in the cabin of truck and he had seen from window glass of the truck that one police constable was standing with the stick in his hand. When both the Panchas were

not able to hear any conversation between driver and accused, then, on what basis the Punampuri was able to heard the conversation between the accused and driver. Therefore, the following evidence of driver Ummarbhai is relevant : “Near the petrol pump at Harij two constables were standing and had asked for entry fee and he had given Rs.20/- of the denomination of Rs.10/- each. They were in the uniform but, he could not identify any of them in the Court. The constable had accepted Rs.20/- and the panchnama was prepared and Rs.20/- was seized from the police constable. No constable met me near the petrol pump. He had stopped the truck for taking tea at four road. The Inspector asked for the change from the police constable but he was not possessing the change of Rs.20/-, the Inspector gave Rs.20/- with pressure to the constable for the change but he was not possessing the change. Then Patil told him that he was taking the bribe and so he was arrested. He has stated that the

constable had not demanded the money nor accepted bribe from him.”

11.1 This being the evidence as observed by the trial Court of the driver Ummarbhai who is not at all supporting the case of the prosecution.

12. Then, Shri T.M.Parmar, who was serving as Police Inspector in ACB, Mehsana (Exh.24) has deposed before the trial Court that both the Panchas set in the cabin and they were asked to hear the talk and see the exchange of money.

13. Then, Shri N.R.Patil was examined vide Exh.27, who was serving in the Vigilance Cell of the High Court, as Police Inspector. At the time of incident, he was working as ACB Police Inspector. He deposed before the trial Court that PW-2 was sitting in the jeep and he was sitting with PW-1. The owner of the cattle was sitting in

the truck. It is not clear whether Rs.24/- was recovered from the accused No.1 from the hand or from the pocket. PW-1 was sitting along with the driver of the truck. This evidence was recorded by the trial Court and then gave finding in Para.19 onwards. After considering certain decisions of the Apex Court and various High Courts, in para.20 of the judgment, the following observations made by the trial Court “it is true that in our case the trap witness Ummarbhai Mallubhai Rauma has not supported the case of the prosecution. It should also be born in mind that he is a truck driver and he has to pass on high ways, district roads for carrying the transportation activities with goods and so he would come across number of police men on the road and so as man of ordinary prudence his conduct of not supporting the prosecution can easily be explained because he would not try to face the wrath of the police-men by speaking and depositing against them in order to rope them

under the clutches of law.” These observations of the trial Court based only on presumption and without any legal evidence on record. In para.24 of the judgment, the trial Court has observed that “there are four witnesses, who had seen the accused demanding Rs.20/- from the driver Ummarbhai who was truck driver in which two panchas, Punampuri and complainant Shri Patil were travelling. The trial Court believed the evidence of prosecution witnesses; one complainant Shri Patil, Police Constable Shri Punampuri and two Panchas.” In Para.27, the trial Court has come to conclusion and observed as that “it is an admitted position that both the accused were serving at Harij Four Roads as there was a dacoity on the petrol pump and in order to protect the said property they were posted there by Harij Police Station. They were in the uniform which is also not in dispute. It is also admitted position that the truck driver had paid Rs.20/- to the accused No.1 and the only question to be

decided as to whether the truck driver had paid Rs.20/- as bribe and accepted by the accused No.1 or whether the said amount was paid for getting the change.”

14. The trial Court has relied upon the payment of Rs.20/- to the accused and relying upon the statement of accused No.1 recorded under Section 313 of the Code of Criminal Procedure, the evidence of Shri Patil that PW-2 was sitting in the jeep has totally brushed aside by the trial Court. According to trial Court, both the panchas were travelling in the truck along with Shri Patil, who filed complaint. The prosecution case based on evidence of four witnesses. The trial Court has relied upon only on one fact that from the hand of accused No.1, Rs.20/- in the denomination of Rs.10/- each was found, but whether that amount which was found in the hand of accused No.1, is an amount of bribe or not, that aspect is not answered by the trial Court.

This being not a lying trap but a running trap, therefore, the trial Court has relied upon only the evidence of four witnesses of prosecution that at the time when the raid is effected, Rs.20/- was found in the hand of accused. The theory of defence of the accused is not believed by the trial Court. Then, the trial Court in Para.33, come to finding that fact of receiving the bribe of Rs.20/- is fully corroborated from the evidence of both the Panchas, Punampuri and PI Shri Patil. According to trial Court, facts remained consistent and accused demanded and accepted Rs.20/- as illegal gratification being a public servant and committed offence punishable under Section 161, 165-A of IPC and Section 5(2) of the Prevention of Corruption Act as charged.

15. The manner in which the trial Court has appreciated the evidence as discussed herein above, now I am appreciating the evidence which was led before the trial Court. The PW-1 Shri

Madhubhai T. Jani (Exh.17) was directed by DDO on 2nd May,1985 from District Panchayat, Mehsana to appear in the panch. On 3rd May,1985, PW-1 was appeared before the ACB Police at Circuit House, Mehsana. The evidence of PW-1 that constable accused has demanded Rs.20/- from the truck driver is not corroborated by other evidence. The accused has not demanded any specific amount but, whatever entry fees to be paid to the constable accused. There was no demand made by accused before the truck driver. The first part of panchnama was prepared at Circuit House vide Exh.18. The Panchnama was drafted by PSI Shri Patil. The signature was obtained from both the Panchas in first part of Panchnama at Mehsana. In return journey from Radhanpur to Harij, PW-1 was with him in the truck. The amount of bribe whether put in pent or pocket of shirt by the accused, he was not aware and from which hand, the amount of bribe was accepted by the appellant, the PW-1 was also not aware. Whether

pocket of shirt or pent has been examined by ultra violate lamp or not, that was not remained in his memory. In the evidence of PW-2, the reference to Rs.4/- in the denomination of Rs.2/- each is not there which is vital omission in the evidence of PW-2. There was no demand for exact amount by the accused from the truck driver, but it was suggested by truck driver Rs.10/- and then paid Rs.20/-. The said evidence of PW-2 is contrary to the evidence in Panchnama Exh.18. It is made clear that PW-2 was with raiding party but not in the truck. According to Panchnama, first part of Panchnama was prepared at Radhanpur. In Panchnama, there is a reference of Rs.4/-. The amount of Rs.20/- and Rs.4/- were found from the pocket of accused. The amount of Rs.20/- and Rs.4/- were found from the right hand of the accused. In panchnama, uniform of accused was examined by ultra violate lamp but there is nothing found in the uniform of the accused. From the pocket of accused No.2, beedi and machis were

found. This Panchnama was prepared at Harij about 00.30 hrs. Both the hands of Shri Patil were not examined by ultra violate lamp. The evidence of PW-2, there is no reference that the first Panchnama was prepared at Mehsana but panchnama was prepared by the police officer and not drawn by Panchas. The instruction given by the ACB officers that on the way, if any police person demands the amount, then, you should have to pay the same to the police person. The first part of the panchnama was prepared at Radhanpur by the police officer. The PW-2 was also in the truck but he was not sure what conversation between he driver and accused about the amount of bribe. The truck was in operation and machine was not stopped. Therefore, there was a noise of machine of the truck when this incident was occurred. PW-2 only suggests that accused has demanded amount but then conversation between driver and accused was not heard by PW-2. The evidence of PW-2 is that accused has put the amount of bribe in the

pocket of shirt, this itself is contradictory to the panchanama because pocket of shirt was examined in ultra violate lamp, but there was no shining on the pocket of shirt of accused. This evidence of PW-2 is also contradictory on vital and material aspect. The panchnama itself is not an evidence, unless the Panch supported the panchnama by his oral evidence. The panchnama can be considered to be the corroborative evidence to the oral evidence of Panchas. But PW-2 was not able to hear the conversation between the driver and accused has not supported the panchnama because the amount of Rs.20/- was not put in the pocket of shirt by accused. So when the raid was effected at that time the amount of Rs.20/- and Rs.4/- were found from the hands of the accused. In cross-examination of PW-2, he suggested that three notes of different denomination. The panchnama was prepared by PI Shri Patil. When there was conversation between constable and truck driver at that time the noise

of machine of the truck was continued. Therefore, he was not able to hear complete conversation between driver and accused. PW-2 was not aware whether the driver has given one note of Rs.10/- or more. The accused has put this note in his pocket but whether his pocket was examined by ultra violate lamp or not, he was not having any knowledge. Thereafter, Shri Punampuri, Police Constable was examined vide Exh.20. He deposed that both the panchas were in the truck and first panchnama was prepared at Radhanpur. There is a different conversation suggested by different witnesses between the driver and accused. So there is no consistent evidence before the trial Court about the conversation between the driver and accused. All the witnesses gave different story of conversation between the driver and accused. In driver cabin more than 9 persons were travelling, that itself is impossible to travel in the cabin of the driver. PW-2 was not able to hear the complete conversation between the driver

and accused because noise of machine of truck, then, how Punampuri was able to hear the exact conversation between the driver and accused. According to evidence of Punampuri, it was not the case of prosecution of demanding of Rs.20/- but it was a case of demanding Rs.15/- from the driver. The whole story has been changed by oral evidence of Shri Punampuri. There is a material contradiction between the evidence of two Panchas and Punampuri. Shri Punampuri was not aware about the fact whether first part of the panchnama was prepared at Mehsana or not. He was sitting outside when first part of the panchanama was prepared. Shri Punampuri was sitting behind the seat of the driver. Looking to the height of the driver seat from the earth and continuous noise of the machine of the truck, whether it was possible to hear the conversation between the driver and accused, that itself is doubtful. PI Shri Patil was in the truck. Shri Punampuri was sitting near the window of the truck but there

was no evidence given by Punampuri that he was able to hear the conversation between the driver and accused when raid was effected. The evidence of driver Ummarbhai Exh.23 is not at all supported the case of prosecution. In prosecution case, the entire chain is required to be established against the accused. The driver Ummarbhai has not deposed before the trial Court that whether two Panchas were with him or not. He was not sure that amount of Rs.20/- had been given to which constable. He was not sure whether it was given to the accused No.1 or not. The driver of truck has not identified the accused No.1. That no amount is to be given back by accused to the driver. The evidence of driver suggests that on the pocket of shirt of the accused there was shining which was mentioned in the Panchnama. The driver has not given any explaination about Rs.4/- of denomination of Rs.2/- each. In the truck along with the cattle, owner and other three persons were sitting.

Whether anthracene powder was applied on the currency notes or not, that was not shown to the driver. The driver Ummarbhai has specifically given evidence that on the way, near Harij petrol pump, no police man was met to him. The truck was stopped for taking tea and water where police-men were also taking tea and water from the hotel. That PSI Patil has demanded change from the police constable, but police constable replied that he was not having change of Rs.20/- even though Shri Patil had given Rs.20/- for change. But constable was not having the change. Therefore, ultimately, Shri Patil has caught the constable that he has taken bribe. The driver's statement on evidence specifically deposed that he has not given any amount of bribe to the accused and accused has not demanded any amount of bribe from him because there was no reason to demand any amount from the driver by the constable. This being a clear evidence of driver Ummarbhai, a person who is alleged to have been

given bribe to the constable. Therefore, the evidence of driver Ummarbhai was not supported to the case of prosecution. Shri Takhatsinh Parmar also deposed that both the panchas were sitting in the cabin of the truck along with other persons. First panchnama was prepared at Radhanpur. He was sitting in the jeep. So he was not the eye witness of conversation between the accused and driver. This witness not deposed before the trial Court that pocket of the shirt of accused was examined by ultra violate lamp and there was shining on the pocket. Shri Parmar has made clear in his evidence that he had not heard the conversation between the driver and accused. The sanction given by competent authority under Section 6(1)(g) of the Prevention of Corruption Act, 1947 on 31st March,1986 that charge against the accused demanding Rs.15/- as a bribe from the truck driver. It is not the sanction of demanding Rs.20/- as a bribe from the driver Ummarbhai. So there is a contradiction between the charge

framed by the trial Court and sanction given by competent authority. That Shri Patil vide Ex.27 deposed before the trial Court that first part of Panchnama was prepared at Radhanpur. Panchnama was prepared by Shri Patil and not drawn by panchas. PW-1 was with truck driver and PW-2 was with raiding party in the jeep. Shri Patil was in the truck. The owner of cattle was also travelling in the cabin of truck along with the police party. The right hand of the accused was examined in ultra violate lamp, there was shining in the right hand of the accused and also shining in Rs.4/- two notes of the denomination of Rs.2/- each. There is also shining in the hand of PW-1. There was another PW-3 who was taken at Deodar by the ACB police. PW-2 was sitting in the jeep which was not mentioned in the complaint. PW-1 has taken the notes was also not mentioned in complaint. Even there was a shining in the hand of PW-1 was also not mentioned in the complaint, though panchnama was prepared at Mehsana. These

two panchas were taken to Deodar by ACB Police. Whether they were used by the ACB police or not, is not aware about this fact. Three panchas were with police at Deodar. Shri Patil was sitting in the truck opposite to the driver side but Shri Desai was sitting behind the driver. The ultra violate lamp was used at petrol pump and accused has not put the amount of Rs.20 in his pocket of shirt and his pocket was examined through ultra violate lamp, but there was no shining on his pocket.

15.1 Looking to the charge sheet, in all there are 16 persons are cited as witnesses. Out of 16 witnesses, complainant Shri Patil, two panchas, driver of the truck Ummarbhai, Shri Punampuri, Takhatsinh Parmar were examined. There are public persons viz. Shri Raghuram Atmaram Sadhu, Babubhai Joitaram Raval, Taher Banaji Rauma and other ACB persons were there, even though except referred above no other witnesses

were examined before the trial Court. Shri Babubhai Joitabhai Raval is a third panch, who was taken at Deodar by the ACB persons. Shri Raghuram Atmaram Sadhu was also an independent witness shown as witness in the charge sheet. When prosecution having number of witnesses including independent witnesses, then, why other independent witnesses were not examined before the trial Court. No explaination is given for not examining all the witnesses before the trial Court. It is not the case of prosecution that they were not present when running trap was effected. These all persons shown in the charge sheet were travelling in truck and jeep of ACB Police. Therefore, there is serious doubt about the conduct of ACB police not declaring driver Ummarbhai and PW-2 hostile and in respect of that evidence, no other independent witness was examined before the trial Court. Therefore, the prosecution was not able to prove the case beyond reasonable doubt, the entire chain of prosecution

case is not proved with consistent evidence against the accused. In the evidence, there is contradiction, omission on material and vital aspect of demand and acceptance by accused No.1.

16. This kind of evidence before the trial Court as narrated above. There is a clear omission and contradiction on vital and material evidence. The complete chain is not established against the accused. The defence of accused in further statement under Section 313 of the Code of Criminal Procedure that he has not taken the amount of bribe, but the amount of Rs.20/- was given for change by police officer. The defence of the accused examined in light of the evidence led before the trial Court, there is no concrete evidence given by any independent witness to prove the fact of demand, and acceptance of currency notes. The accused has not demanded exact amount from the driver. The story of demanding Rs.20/- is false. It is not supported

by any witnesses. The conversation between the accused and driver is not heard by. PW-2, though, according to him, he was sitting in the cabin of truck at that time machine was in operation and there was full noise, therefore, he was not able to hear the conversation. In that circumstances, how Shri Patil and Shri Punampuri was able to hear the exact conversation between accused and driver. When driver is not at all supported the prosecution case, PW-1 was able to hear a different story but PW-2 was not able to hear any exact conversation and Shri Punampuri and Shri Patil was able to hear the exact conversation is not believable and create serious doubt about their evidence as they are interested witnesses. Looking to the height of the driver seat from the earth and the fact that machine of the truck was in operation with full noise, meanwhile conversation was taken place between the driver and constable, whether it was possible to hear exact conversation between driver and constable.

The trial Court has relied upon the evidence of two panchas, Shri Punampuri and Shri Patil. The evidence of Panchas in light of contradiction and omission on vital aspect considering the Panchnama the evidence of both the panchas are not reliable. No doubt, they are independent witness and they are government servant but their evidence is not consistent with panchnama and both are saying different story in their evidence. The presence of PW-2 in cabin is doubtful. Shri Punampuri and Shri Patil both are interested witnesses and are the persons from raiding party. Evidence of PW-1 is that accused has demanded Rs.20/-. Evidence of PW-2 is that he was not able to hear any conversation between the driver and accused. The evidence of PW-2 is also not corroborated with other evidence of Shri Punampuri and Shri Patil. There is no whisper in the evidence of PW-1 about Rs.4/- which was also found in the hand of accused. Different witnesses gave different story and suggested different

conversation between the driver and accused. So whether accused No.1 has demanded Rs.20/- or demanded Rs.15/- is not proved on the basis of the evidence led before the trial Court. There is some evidence of demanding Rs.15/- and some evidence of demanding Rs.20/-. So prosecution was not able to prove the charge by reliable and satisfactory evidence against the appellant. The driver has not supported at all to the prosecution case. The driver was not declared hostile by the prosecution nor was he cross-examined by the prosecution. PW-2 was also not declared hostile and nor was he cross-examined by the prosecution. PW-1 was not able to prove the demand because there is no mention about Rs.4/- which was found from the hand of the accused. So it is also not reliable evidence or trustworthy in absence of independent corroborative evidence. Shri Punampuri and Shri Patil are interested witnesses. Same cannot be relied unless there is independent corroborative evidence by independent

witnesses. The owner of the cattle and other persons were travelling in the cabin, why they were not examined by the prosecution before the trial Court. The owner of the cattle and other persons were also eye witnesses because they were also travelling along with panchas and police officers in the cabin of driver. In this case, two panchas are independent witnesses, but their evidence is contrary to the panchnama as well as their evidence itself and not reliable, has not supported by any other independent witnesses. There is material contradiction about the fact whether accused has pocketed the amount in question or not. There was no occasion to demand the amount by the constable from the driver. There is no reason to believe the demand of constable from the driver. The truck was stopped by the driver near two police constables and raid was effected by giving Rs.20/- in the hand of constable while demanding the change from the constable. Otherwise there is no need of presence

of Rs.4/- in the hand of accused. Panchnama was prepared by Shri Patil. The trial Court has relied upon the evidence of interested witness though driver has not supported the case of prosecution. There is no consistent conversation proved by the witnesses before the trial court. Merely recovery of currency notes is not enough to establish the charge against the accused. The explaination given by accused is not considered as a whole by trial Court in statement of accused under Section 313 of the Code of Criminal Procedure cannot prove the case of prosecution of demanding the bribe and accepting the bribe by the accused. The explaination of the accused has to be considered as a whole. The defence of the accused is probable because Shri Patil who was travelling in the cabin with panchas. The rule of prudence requiring corroboration for the testimony of a trap witnesses has always been recognized. The charge under Section 161 of IPC and Section 5(2) of Prevention of Corruption

Act,1947 which is easily and may often be lightly made, but is in must in most cases be meagre and of a tainted nature. These considerations cannot, however, be suffered to relieve the prosecution of any part of the burden which rests upon it to establish the charge beyond reasonable doubt. If after every thing that can legitimately be considered has been considered giving its due weight, room still exits for taking the 'view' that however strong the suspicion raised against the accused, every reasonable possibility of innocence has not been excluded, then accused is entitled to an acquittal. It is important to note that it is a running trap naturally require more credibility of witnesses. The appreciation of the trial Court as narrated in Para.33 of the judgment Item No.7 is not properly appreciated the evidence of panchas Shri Punampuri and Shri Patil. When PW-2 deposed before the trial Court that he was not able to hear the conversation between the driver

and accused because of the noise of machine of the truck, then, other three persons those who were near to him and at little distance from the driver seat, PW-1, Shri Punampuri and Shri Patil how they would be able to hear the exact conversation between the driver and accused. The evidence of PW-2 has not been properly appreciated by the trial Court. The driver has not at all supported the conversation as deposed by Shri Punampuri and Shri Patil. The accused No.1 had not accepted the currency notes by way of demand of bribe. That conversation is required to be proved by independent witnesses or corroboration. These two witnesses Shri Punampuri and Shri Patil are interested witnesses being a person of raiding parity. The evidence of PW-1 is not proving a clear conversation of demanding bribe from the driver. The evidence of Punampuri and Shri Patil are little different from the evidence of PW-1. There is no consistency between the evidence of PW-1 and PW-2 and Punampuri and

Patil. There are conflict version and contradictory evidence and not corroborated by panchanama. Presence of PW-2 in the cabin itself is doubtful. Presence of almost 9 persons in cabin of driver is also doubtful. When machine of the truck was in operation, and considering height of driver seat from the earth, there was no chance or possibility to hear the exact talk between driver and accused. Shri Punampuri and Shri Patil both were sitting on opposite side of the driver. PW-1 was sitting behind the driver seat, so from such a distance whether accused were of demanding bribe and accepting the bribe is not possible to prove by evidence of Shri Punampuri and Shri Patil. Merely recovery of currency is not enough to prove the charge against the accused No.1. The recovery of currency notes explained by accused No.1 which is probable. The recovery of three notes not from the pocket of accused but it was in the hand of accused No.1. Therefore, in absence of demand of

bribe and acceptance of bribe, the charge under Section 161 read with Section 5(2) of the Prevention of Corruption Act cannot be proved. The charge which has been framed by the trial Court of demanding Rs.20/- by public servant being accused No.1 is also not proved because the evidence of panchas, Punampuri and Patil are totally different and not suggested the demand of Rs.20/-. But their case is demand of Rs.15/-. Therefore, apparently while evaluating the entire evidence of all witnesses including the driver as well as the charge framed by the trial Court and sanction order, according to my opinion, there is no reliable evidence against the accused No.1 present appellant to prove the charge framed by the trial Court against the accused No.1 present appellant. Therefore, serious suspicion or doubt in running the trap which effected by ACB Police officers against the appellant. The evidence as led before the trial Court even in case of two views are possible and probable defence of the

accused No.1, then, benefit of doubt is given to the accused No.1. Therefore, according to my opinion, the charge levelled against the accused No.1 present appellant is not proved beyond reasonable doubt.

17. Therefore, in view of the above, the judgment and order dated 7th December,1991 passed by the learned Special Judge, Mehsana in Special (A.C.B.) Case No.9 of 1986, convicting the present appellant – original accused No.1 under Section 161 of IPC and Section 5(2) of Prevention of Corruption Act, read with Section 235 (2) of the Code of Criminal Procedure, is hereby quashed and set aside. Appeal is allowed. The appellant is declared acquitted. Bail bond shall stand cancelled and surety is discharged.

(H.K.Rathod,J.)

(vipul)